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No. 87-903

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTTIS B. CROCKER, JR., ET AL. PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether minority shareholders have a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against corporate directors and officers for actions that injured the corporation, reducing the value of the minority's shares.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 826 F.2d 347. The opinion of the district court (Pet. App. 14a-23a) is reported at 623 F. Supp. 963.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1987. The petition for a writ of certiorari was filed on December 1, 1987. The jurisdiction of this U.S. Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are shareholders of The Mississippi Bank (Bank), which was closed by the Mississippi State Commissioner of Banking on May 11, 1984. A state court immediately adjudicated the Bank insolvent, and respondent Federal Deposit Insurance Corporation (FDIC) was appointed receiver. Pet. App. 2a, 15a. The FDIC as receiver

then entered into a "purchase and assumption" agreement under which Grenada Bank purchased certain of the Bank's assets and assumed certain of its liabilities, so that Grenada Bank could take over the Bank's business without a break in banking operations. The FDIC in its corporate capacity then purchased the remainder of the Bank's assets. *Ibid.*; see *Langley* v. *FDIC*, No. 86-489 (Dec. 1, 1987), slip op. 5.

Thereafter, on August 13, 1984, petitioner shareholders filed a nonderivative suit in federal district court against the nonfederal respondents, former officers and directors of the Bank, seeking damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. IV) 1961 *et seq.*, and various common-law theories of recovery (Pet. App. 2a-3a). Respondent FDIC intervened and moved to dismiss the complaint, arguing that any action against the former officers and directors belonged to the FDIC, which had purchased the Bank's choses in action, and not to the Bank's stockholders. The district court denied the motion, finding that petitioners' complaint stated a cause of action, but certified the question to the Fifth Circuit. *Id.* at 3a, 16a-23a.

The court of appeals reversed. It focused on RICO's requirement that a person be "injured in his business or property by reason of a violation of [RICO]" (18 U.S.C. 1964(c); see *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496-497 (1985)), and found that, under Mississippi law, petitioners did not have any claim of their own (as distinct from a derivative claim on behalf of the Bank) arising out of the decline in value of their stock (Pet. App. 12a-13a). The Fifth Circuit also rejected (*id.* at 8a-11a) petitioners' argument that the former officers and directors had directly injured them; petitioners' theory was that if the defendants had more fully informed them (but not, presumably,

the public) about the Bank's troubles, they would have had an opportunity to sell their stock before it was discovered to be worthless; the court of appeals found this argument "too speculative to state any injury to the shareholders, apart from a diminution in the value of their stock" (*id.* at 10a). In sum, the court of appeals concluded that petitioners lacked standing to assert a claim on behalf of the Bank under RICO, and had no individual cause of action under RICO (*id.* at 13a).

ARGUMENT

Petitioners ask this Court to address a question not raised or discussed below, one that has received the same answer from all the courts of appeals that have reached it. Accordingly, further review is not warranted.

As the court of appeals explained (Pet. App. 4a (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 496)), under 18 U.S.C. 1964(c), " 'the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.' " In order to decide whether petitioners had alleged injury to their property, the court of appeals turned to the law of Mississippi, the Bank's state of incorporation; the court determined that under Mississippi law a shareholder may not maintain an action in his own name for a wrong to the corporation, merely because one indirect consequence of the wrong is a diminution of the value of his shares (Pet. App. 5a). Petitioners did not dispute this rule of Mississippi law, or the applicability of Mississippi law to this case, but claimed that they came within "the widely recognized exception" to the rule, under which "a shareholder may maintain a nonderivative action for the violation of a duty owed directly to the shareholder as an individual" (*id.* at 6a (cita-

tions omitted)). The court of appeals, however, ruled that the theory on which petitioners asserted such a direct duty—that the officers and directors had a duty to tell petitioners about the bank's troubles, so that they could sell their stock to the public—was untenable (*id.* at 8a-11a). Petitioners do not challenge that ruling in this Court.

Instead, petitioners now claim (Pet. 3-6) that the reduction in the value of their shares constitutes injury to their property within the meaning of RICO, even if that decline resulted from injury to the corporation for which they would have no nonderivative claim under state law. Petitioners did not make this argument below—indeed, they appear to have conceded that a shareholder has no direct remedy for injuries to the corporation (see Pet. App. 7a)—and the court of appeals did not address the possibility that, notwithstanding state law, RICO permits a shareholder to recover for an injury suffered by the corporation.[1]

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[1] Petitioners suggest that there is a conflict between the Fifth Circuit's recourse to Mississippi law and the Seventh Circuit's opinion in *Schacht* v. *Brown*, 711 F. 2d 1343, cert. denied, 464 U.S. 1002 (1983), which they say indicates that "when there is a claim under RICO, the analysis of standing should be governed by federal policy considerations in enforcing federal laws" (Pet. 3). There is no conflict. In *Schacht*, the Illinois Director of Insurance, as liquidator of Reserve Insurance Company, brought a RICO action for damages Reserve had sustained as a result of alleged fraud. The defendants claimed that the Director lacked standing because he could bring only those actions Reserve could have brought, and Reserve would have been estopped from bringing the RICO action (711 F. 2d at 1346). The Seventh Circuit treated the estoppel question as a matter of RICO law, not state law, and found that a RICO suit by Reserve would not have been estopped (*id.* at 1347). Because of its holding on estoppel, the court of appeals found it unnecessary to rule on the first part of defendants' argument; in dictum, however, the Seventh Circuit agreed "that the

Other courts of appeals, however, have considered the RICO standing issue, and have reached a uniform conclusion: where there is one injury—a reduction in the corporation's value that is reflected in the share price—there can be only one recovery, and that by the corporation. As the Second Circuit has explained, "[t]he RICO action * * * is a corporate asset, and shareholders cannot bring it in their own names without impairing the rights of prior claimants to such assets," *Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (1986); accord *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931, 937-938 (4th Cir. 1987); *Gaff* v. *FDIC*, 814 F.2d 311, 317-318 (6th Cir. 1987); *Warner* v. *Alexander Grant & Co.*, 828 F.2d 1528, 1530-1531 (11th Cir. 1987); see also *Carter* v. *Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (under RICO, "an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief").[2]

Moreover, petitioners do not appear to have made out a plausible claim under RICO even if the decline in the value of their shares were a sufficient "injury" to give them standing. Petitioners have not sought to demonstate that the Bank itself was injured by fraud. Rather, they appear to have argued that the Bank failed because of mismanagement; the alleged fraud consisted of a failure to

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Director may pursue no action which could not have been asserted directly by Reserve before liquidation," and cited a series of Illinois statutes and precedents on the issue (711 F. 2d at 1346-1347 n.3). Thus, *Schacht* actually acknowledges that under some circumstances standing under RICO will depend on questions of state law.

[2] Petitioners claim (Pet. 4) that two of these cases—*Rand* and *Gaff*—as well as *Warren* v. *Manufacturers Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985), hold "that the laws of a particular state determine whether a plaintiff has been injured for purposes of standing under RICO." None of those cases refers to the law of any particular state.

disclose the Bank's true financial condition to them (Pet. App. 21a), apparently so that they could pass the cost of the Bank's failure on to unsuspecting purchasers of their stock (*id.* at 8a-11a). The court of appeals correctly rejected (*id.* at 10a n.6) this claim to a right to engage in insider trading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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